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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217199; B-217210

DATE: March 25, 1985

MATTER OF: Swan Industries

DIGEST:

1. Agency is not required to set aside a procurement for small business concerns pursuant to the Federal Acquisition Regulation, 48 C.F.R. § 19.501(g), where a different contracting office had previously acquired these services on the basis of a small business set-aside.
2. A small business offeror protesting issuance of an unrestricted solicitation on which it did not submit an offer is an "interested party" to have its protest heard because the remedy sought is cancellation and resolicitation as a small business set-aside.
3. A challenge to the Standard Industrial Classification utilized in determining whether to set aside a procurement for small business is not for consideration by GAO, since conclusive authority over this question is vested in the Small Business Administration.

Swan Industries (Swan) protests the decision of the Naval Regional Contracting Center, Washington, D.C. (Navy), to issue request for proposals Nos. N00600-84-R-3304 and N00600-84-R-2987 for professional, technical and managerial services on an unrestricted basis rather than on a small business set-aside basis. Swan contends that the Navy assigned an incorrect Standard Industrial Classification (SIC) code to the procurements and that this error prevented the Navy from setting them aside for small business.

We deny the protest.

Initially, the Navy argues that Swan is not an interested party under our Procedures because it did not submit an offer on the solicitation. We disagree. While

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Swan did not submit an offer on the unrestricted solicitation, the remedy Swan seeks is a resolicitation which would be set aside for small businesses. Therefore, if the protest is successful, Swan would be a potential competitor on the resolicitation and would obtain a direct benefit. Deere & Company, B-212203, Oct. 12, 1983, 83-2 C.P.D. ¶ 456.

The Small Business Act, 15 U.S.C. § 637 et seq. (1982), reflects a national policy of furthering the interests of small business concerns and awarding a fair portion of government contracts to such concerns. There are only two situations, however, outlined in the Federal Acquisition Regulation (FAR), in which an agency generally is required to set aside a specific procurement for small business concerns. One is where a contract has an anticipated dollar value of \$10,000 or less and is subject to small purchase procedures. See 48 C.F.R. § 19.501(f) (1984). The other situation is outlined at 48 C.F.R. § 19.501(g), which states in relevant part:

"Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside." (Emphasis added.)

Department of Defense (DOD) Regulations so require. DOD FAR Supplement, 48 C.F.R. § 219.501(g) (1984). In all other cases, the decision to set aside a procurement for small business, based on whether there is a reasonable expectation of receiving bids from at least two responsible small business concerns and that award can be made at a reasonable price, 48 C.F.R. § 19.502-2, is discretionary with the contracting officer. Art Anderson Associates, B-211546, May 6, 1983, 83-1 C.P.D. ¶ 482.

Swan contends that 48 C.F.R. § 19.501(g) is applicable because the Naval Regional Contracting Center, Philadelphia, has previously procured these identical services under a total small business set-aside and because both the Philadelphia and Washington Contracting Centers are a part of the Naval Supply Systems Command's contracting activity. The regulation, however, requires that the same product or service must have been acquired successfully through a small business set-aside by the same "contracting office."

48 C.F.R. § 2.1 defines "contracting office" as "an office that awards or executes a contract for supplies or services and performs post-award functions not assigned to a contract administration office." It is clear that while both the Philadelphia and Washington Centers are subordinate elements of the same command, they are separate offices. Therefore, since the Philadelphia contracting office procured the services in the past and this time the Washington, D.C., contracting office is procuring the services, 48 C.F.R. § 19.501(g) does not require the Navy to set aside the instant requirements. See Eastern Trans-Waste Corp., 63 Comp. Gen. 519 (1984), 84-2 C.P.D. ¶ 126.

We do note that the contracting officer, in determining that there was no reasonable possibility of obtaining offers from at least two small business concerns, relied on the recommendation of the Small and Disadvantaged Business Utilization officer and received the concurrence of the SBA's procurement center representative. Thus, the record suggests that the contracting officer was acting well within his discretion here despite the prior successful set-aside at the Philadelphia Center.

Concerning Swan's argument that the Navy used the wrong SIC code in determining whether to set the procurements aside, under Small Business Administration (SBA) regulations, the initial determination of the appropriate SIC code shall be made by the contracting officer with the right of appeal to the SBA. The SBA's determination on such matters is conclusive. 13 C.F.R. § 121.3-6 (1984).

The record shows that Swan protested the SIC code to the SBA Office of Hearings and Appeals, but the protest was dismissed because of a lack of jurisdiction since the solicitation was issued on an unrestricted basis and therefore the SIC code had no impact on whether a small business could participate. While SBA did not rule on the SIC code issue, our Office is still precluded from considering the matter. Graphics Industries Association, B-212963, Sept. 20, 1983, 83-2 C.P.D. ¶ 352.

The protest is denied.

for Seymour Efron
Harry R. Van Cleave
General Counsel